(2)

No. 86-328

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CHAMPION INTERNATIONAL CORPORATION,
Petitioner

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, CLC, and its LOCAL 5-376,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The United States Court of Appeals for the Fifth Circuit, sitting *en banc*, reached the unanimous *result* that a prevailing defendant employer, in an action brought in good faith under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, is not entitled to be reimbursed by the non-prevailing plaintiffs for expert witness fees. Are there any "special and important reasons" for reviewing such *result*?

2. If the writ is granted, was the majority of the Court of Appeals correct in directing district courts under its supervision to deny to all prevailing *plaintiffs*, in litigation under civil rights statutes 42 U.S.C. §§ 1988 and 2000e-(k), reimbursement of expert witness fees beyond those specified in 28 U.S.C. § 1821 or provided under other narrow exceptions?

PARTIES TO THESE PROCEEDINGS

The correct name of the respondents in these proceedings, somewhat different from the representation in the Petition, is International Woodworkers of America, AFL-CIO, CLC, and its Local 5-376.

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The respondents International Woodworkers of America, AFL-CIO, CLC, and its Local 5-376, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the Fifth Circuit reported at 790 F.2d 1174 (5th Cir. 1986). In the alternative, if the writ is granted, the respondents seek reversal of the direction of the Fifth Circuit majority with respect to costs issues for prevailing plaintiffs in civil rights cases.

SUPPLEMENTAL STATEMENT OF THE CASE

A somewhat more impartial statement of the pre-appellate developments in the case than appears in the Petition for Writ of Certiorari appears in the per curiam

opinion of the Fifth Circuit panel. Petition, at B-2 to B-4.

In view of the unchallenged finding of the District Court that the lawsuit was not frivolous, unreasonable or unfounded, the panel applied *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), to deny to the prevailing defendant employer the expert witness fees in issue. On rehearing *en banc*, all judges agreed with the result, but an 11-4 majority took the occasion to overrule previous Fifth Circuit precedent and direct the district courts under its jurisdiction:

> that the fees of non-court-appointed expert witnesses are taxable by federal courts in non-diversity cases only in the amount specified by [42 U.S.C.] § 1821, except that fees in excess of that amount may be taxed when expressly authorized by Congress, or when one of the three narrow equitable exceptions recognized by *Alyeska* [*Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)] applies.

Petition, at A-13.

STATUTES INVOLVED

In addition to the provisions quoted by the Petition (28 U.S.C. § 1821(b) and Rule 54(d) of the Federal Rules of Civil Procedure), the following statutes also are involved:

> 28 U.S.C. § 1821(a)(1). Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.
>
> 42 U.S.C. § 1988. . . . [In any action under specified federal civil rights statutes including 42 U.S.C. § 1981] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
>
> 42 U.S.C. § 2000e-(k). In any action or proceeding under this subchapter, the court, in its discretion,

may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

REASONS FOR DENYING THE WRIT

1. The Issue Raised by the Petition Has Been Resolved.

"Except as otherwise provided by law," 28 U.S.C. § 1821(a)(1) begins, "a witness . . . shall be paid the fees and allowances provided by this section." Such section currently establishes "an attendance fee of $30 per day." 28 U.S.C. § 1821(b).

Any question of special consideration for the fees of expert witnesses on the basis of the judicial code itself was resolved by *Henkel v. Chicago, St. P., M. & O. Ry. Co.*, 284 U.S. 444 (1932). The Court held that a plaintiff who prevailed in an action under the Federal Employers' Liability Act could not recover as costs additional fees for expert witnesses who testified at trial. Noting that specific statutory provisions as to the amounts taxable as witness fees had been enacted by Congress as early as 1799, the Court held that "when the Congress has prescribed the amount to be allowed as costs, its enactment controls." 284 U.S. at 446. Accordingly, the Court ruled that, apart from the witness fees allowable by statute, "additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the federal courts." *Ibid.*

Henkel has never been overruled or modified by the Supreme Court. The judicial code sections which deal with costs have been modified only in ways which support the *Henkel* result; in 1978, for example, "Compensation of *court appointed* experts" became taxable under 28 U.S.C. § 1920(6). Pub. L. 95-539, § 7, 92 Stat. 2044 (1978) (Emphasis added.)

Thus the very general question advanced by the Petition, whether "district courts possess discretion to award expert witness costs to the prevailing party in non-diversity cases" (Petition, at 7) (where, presumably, there is no question of other authorization from Congress), has been answered. Moreover, every judge of the district and appellate courts that have passed on this phase of this case has agreed that the petitioner is not entitled to the $11,807.16 (*see* Petition, at D-5) it still seeks.

The *result* below, in terms of either the broad or narrow concerns of the petitioner, does not present "special and important reasons" for granting the writ.

2. If the Writ Is Granted, the Majority Decision of the Court of Appeals Includes a Direction to the District Courts Under Its Jurisdiction to Deny to Prevailing Plaintiffs, in Litigation Under Civil Rights Statutes, Reimbursement of Expert Witness Fees, a Direction Which Has Extremely Serious Consequences and Which Is Contrary to the Intention of Congress and the Practice Applied in Every Other Circuit.

Although the result sought by the respondents was reached, the reasoning of the majority opinion of the Fifth Circuit is seriously harmful to other concerns of the respondents and will be contested if the writ is granted. *See Blum v. Bacon*, 457 U.S. 132, 137, n.5 (1982); *Berkemer v. McCarty*, 468 U.S. 420, 435, n.23 (1984).

Relying on previous Fifth Circuit decisions such as *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) (*en banc*), *cert. dismissed*, 453 U.S. 950 (1981), the District Court and the Fifth Circuit panel found the attorney's fee shifting provisions of federal civil rights statutes inclusive of expert witness fees. *See also Fairley v. Patterson*, 493 F.2d 598, 606, n.11 (5th Cir. 1974). Since, in the sense of *Christianburg*, the action had been "brought

in good faith and was neither frivolous, unreasonable nor without foundation," the claim of the prevailing defendant employer for expert witness fees must be denied. (It is not accurate, as stated by the *en banc* majority, that "the panel declined to reach the applicability of the [*Christianburg*] standard." Petition, at A-4. What it declined to reach was the question of expert fees as costs *if* the *Christianburg* good faith standard had *not* been met. Petition, at B-5.)

But by 1986 the *en banc* split of *Jones v. Diamond* had been reversed, and the new majority chose the instant case as a vehicle for stating a new rule, in the form of a direction to the district courts. As to all cases pending within the Fifth Circuit on June 2, 1986, "the fees of non-court appointed expert witnesses are taxable" only as any other costs or "when *expressly* authorized by Congress." Petition, at A-13. (Emphasis added.)

For the purposes of consideration of a writ here, the concurring opinion in the Fifth Circuit well states the reasons for error when such a direction is applied to civil rights cases. Petition, at A-14 to A-35.

First, the new rule is contrary to the intention of Congress, as described particularly during the enactment of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988. Petition, at A-17 to A-18. *See also Hensley v. Eckerhart*, 461 U.S. 424, 433, n.7 (1983) (standards generally the same for fee awards under the 1976 Act and Title VII; the instant action was grounded on 42 U.S.C. § 1981 as well as Title VII). *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), is the prime source cited by the majority opinion, yet the 1976 congressional action was taken in response to the *Alyeska* result, and should receive plenary consideration.

Second, the new rule is contrary to that expressed by every other circuit. Petition, at A-20 to A-23. *See, e.g.*,

Dowdell v. City of Apopka, Fla., 698 F.2d 1181, 1188-92 (11th Cir. 1983).

Third, the new rule is destructive to the established concept of "private attorneys general," a significant element in the effectuation of national civil rights policy. *E.g., Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). The costs of expert witnesses can be "staggering" (Petition, at A-34); the initial Bill of Costs here sought $31,468.87 for a single witness and her entourage. If they are not recoverable by prevailing civil rights plaintiffs, in most instances those costs must be paid out of attorney's fees. In such event, the now considerable body of law issued by this Court controlling the computation of attorney's fees may require new examination in light of the severe diminution effected by an additional obligation to pay the expert fees. *See Hensley v. Eckerhart, supra; City of Riverside v. Rivera*, —— U.S. ——, 54 U.S.L.W. 4845 (6-24-86) (law clerk costs awarded, but not appealed; 54 U.S.L.W. at 4846).

The respondent International Woodworkers of America has a particular interest in this last issue. In spite of relatively small size and resources, the IWA has conducted a successful program to enforce Title VII in the wood products industry. *See, e.g., International Woodworkers of America v. Georgia-Pacific Corp.*, 568 F.2d 64 (8th Cir. 1977), *on remand, sub nom. Powell v. Georgia-Pacific Corp.*, 535 F.Supp. 713 (W.D. Ark. 1980, 1982); *International Woodworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259 (4th Cir. 1981), *on remand*, 34 Empl. Prac. Dec. (CCH) ¶ 34,324 (D. Md. 1984); *Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984).

The financial stresses of that program to effectuate federal civil rights law in employment contexts have been severe, but the IWA has managed to maintain it for about fifteen years. *See, e.g., International Woodworkers*

of America v. Chesapeake Bay Plywood Corp., supra, 34 Empl. Prac. Dec. at 33,275 ($15,193.98 in "expenses" properly payable); Youngdahl, *Union Standing in Prosecution of Employment Discrimination Litigation: Questions of Class*, 38 ARK. L. REV. 24, 32-38 (1984). If responsibility for expert witness fees is added to the burden even when the union prevails, its practical ability to continue the program is, at least, in jeopardy. For recognition by this Court of the financial problems of far larger labor organizations, *compare IBEW v. Foust*, 442 U.S. 42, 50-51 (1979); *Vaca v. Sipes*, 386 U.S. 171, 197 (1967).

In a sense, prior proceedings in this very case illustrate the practical problem. The face of the opinion on the merits by the District Court, and the comments of the court during trial, indicated that if the plaintiffs had produced a countervailing expert they could have prevailed. *International Woodworkers of America v. Champion Intl. Corp.*, 30 Empl. Prac. Dec. (CCH) ¶ 33,287 (N.D. Miss. 1982), *affd.*, 732 F.2d 939 (5th Cir. 1984). The reason none was produced was because of the initial outlay of money thereby required. Reconsideration of that probably mistaken tactical decision by the plaintiffs would be made unlikely for future cases in the Fifth Circuit, under the direction of the majority here.

In sum, a portion of the decision of the Fifth Circuit in this case, when applied to litigation under federal civil rights statutes, is contrary to the intention of Congress, contrary to the practice applicable in all other circuits, and a severe impediment to enforcement of the civil rights policy of the nation.

CONCLUSION

The respondents oppose the writ because the result below was correct.

However, if a writ is granted, the direction of the Fifth Circuit concerning expert witness fees for prevailing plaintiffs in civil rights cases should be reversed.

Respectfully submitted,

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